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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Wineesa Cole, individually and on behalf of all others similarly situated,

Plaintiff,

v.

Asurion Corporation, a Delaware Corporation, Asurion Insurance Services, Inc., a Tennessee Corporation, T-Mobile USA, Inc., a Delaware Corporation, Liberty Mutual Insurance Company, a Massachusetts Corporation, and DOES 1 through 500.

Defendants.

Case No. CV-06-6649-PSG (JCx)

Honorable Philip S. Gutierrez

NOTICE OF MOTION AND MOTION FOR CLASS CERTIFICATION; MEMORANDUM OF POINTS AND AUTHORITIES

[REDACTED]

Date: February 22, 2010
Time: 8:30 a.m.
Ctrm.: 790

NOTICE OF MOTION

TO THE COURT AND TO ALL PARTIES OF RECORD:

PLEASE TAKE NOTICE THAT ON February 22, 2010, at 1:30 p.m., or as soon thereafter as counsel can be heard in the Courtroom 790 of the of the United States District Court for the Central District of California, located at 255 East Temple Street, Los Angeles CA 90012, Plaintiff Wineesa Cole shall appear before the Hon. Philip S. Gutierrez, United States District Judge, and bring her motion for class certification.

MOTION

Plaintiff Wineesa Cole hereby requests, pursuant to Fed.R.Civ.Proc. 23(b)(3) and 23(c)(1)(A), that the Court certify this matter to proceed as a class action. Pursuant to Fed.R.Civ.Proc. 23(c)(1)(B), Plaintiff requests that the Court certify the following classes:

1. Class No. 1

All persons who while residing in the State of California purchased cellular telephone insurance from Asurion through T-Mobile USA from August 1, 2003 to April 2, 2008.

2. Class No. 2

All persons who while residing in the State of California were switched on July 1, 2005 from a T-Mobile cell phone insurance policy underwritten by The Hartford to a T-Mobile cell phone insurance policy underwritten by Liberty Mutual with a monthly premium of $5.99, and a deductible of $110, and paid a premium at any time between July 1, 2005 and August 2, 2006.

Finally, pursuant to Fed.R.Civ.Proc. 23(g), Plaintiff Cole asks that she be appointed as the class representative, and that The Kick Law Firm, APC, be appointed as class counsel.

This motion is based on this notice of motion and motion; the attached memorandum of points and authorities; the Declaration of Taras Kick, the pleadings and papers on file; and such other evidence and argument as may be presented to the Court prior to or at the hearing on this matter.

This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on November 24, 2009.

Dated: December 20, 2009

THE KICK LAW FIRM, APC

By: /s/ Matthew E. Hess

Taras P. Kick, Esq.
Matthew E. Hess, Esq.
Thomas A. Segal, Esq.
Attorneys for Plaintiff,
Wineesa Cole

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The cellular telephone insurance marketed to consumers by Defendants Asurion Corp., Asurion Insurance Services, Inc. (collectively, "Asurion") and T-Mobile USA, Inc. ("T-Mobile") purports to permit Asurion to fulfill claims with "refurbished" telephones instead of new telephones. "Refurbished" telephones are manufactured from parts salvaged from telephones that were returned as damaged or defective. Between 50% and 75% of the phones Asurion ships to its customers are "refurbished." Declaration of Matthew E. Hess ("Hess Decl."), ¶ 5. Exh. D.

REDACTED

Moreover, Asurion's insurance purports to give it the right to fulfill claims with replacement telephones that are of a different make and model. In other words, if a customer loses his Blackberry, Asurion may send him an iPhone as a replacement.

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Plaintiff Wineesa Cole purchased a T-Mobile telephone, and Asurion's cellular telephone insurance on April 19, 2004 in Torrance, California. At the time, Ms. Cole was working as a secretary for Nissan North America. Cole Dep., p. 9:6-15. The sales representative who dealt with Ms. Cole, "Ricky," used Asurion's standardized sales script to describe the insurance to her. He then showed Ms. Cole a copy of Asurion's standardized, preprinted brochure and directed her attention to the premium, deductible, and limit of coverage in the brochure, and nothing else. Ms. Cole then agreed to purchase the insurance. Cole Dep., pp. 40:5-18, 79:22-25 - 89:21-24.

Thereafter, in July 2005, Asurion tripled Ms. Cole's deductible from $35 to $110 and raised her premium from $3.99 to $5.99 when it switched the underwriter of the policy from Hartford to Liberty Mutual. At the time of the policy switch, neither Asurion nor T-Mobile was licensed to transact business for Liberty Mutual.

REDACTED

further, those facts are not highlighted in its brochure. Ms. Cole testified that had she

been informed of these facts, she would not have purchased the insurance. Cole Dep., p. 89:2-18. On December 1, 2009, this Court held that there are triable issues of fact as to whether Asurion adequately disclosed the material terms of its insurance. Hess Decl., ¶ 9 Exh. H.

In the landmark decision of In re Tobacco II Cases, 46 Cal.4th 298 (2009), the California Supreme Court recently explained that a class action may be certified under California's Unfair Competition Law (UCL) if it is based on a "common course of conduct" that is "likely to deceive" consumers. Id. Only the class representative need show reliance on the misrepresentations or omissions; the absent class members need not show this on an individualized basis. Id. ("[R]elief under the UCL is available without individualized proof of deception, reliance and injury.") In other words, as the California Supreme Court explained, for the absent class members "[i]t is necessary only to show that 'members of the public are likely to be deceived.'" Tobacco II, 46 Cal.4th at 311. As such, this case is ideally suited for certification.

Class certification of Ms. Cole's UCL claims is appropriate under Tobacco II because all which remains to be demonstrated in this case is the common question of whether under Asurion's promotional practices for its cell phone insurance, "members of the public were likely to be deceived." Tobacco II, 46 Cal.4th at 311. The policy switching claims are equally appropriate for certification since they were group policies under which all insureds were switched from one policy to the other at one time. This motion therefore seeks certification of the UCL claims, as well as the other claims as described below.

II. STATEMENT OF FACTS

A. Defendants' Common Course of Material Omissions

REDACTED

Ms. Cole was not informed that she may receive a refurbished phone, a phone of a different make and model, or a phone worth less than the amount of the deductible, and those facts are not highlighted in Asurion's brochure. Hess Decl., ¶ 2, Exh. A.

B. Defendants' Unlicensed Sale of Insurance

Next, the evidence will show that on July 1, 2005, Asurion and T-Mobile began selling insurance on behalf of the Liberty Mutual Insurance Co. **when they were not licensed to do so**. Hess Decl., ¶¶ 10-11, Exhs. I-J. Specifically, it is undisputed that on July 1, 2005, Asurion and T-Mobile switched all of their existing customers from a policy underwritten by The Hartford to a new policy underwritten by Liberty Mutual, when neither was licensed to transact business on behalf of Liberty Mutual. Asurion then used this policy switch as an excuse to raise Plaintiff's deductible from $35 to $110 (for a phone for which she paid $100), and to raise her premium from $3.99 per month to $5.99. Hess Decl., ¶ 12, Exh. K; Cole Dep., p. 54:2-6. The claims arising from these facts are suited for class treatment; each and every customer who on July 1, 2005 was switched to a Liberty Mutual when T-Mobile was not licensed to transact business on behalf of Liberty Mutual.

C. Defendants' Breach of the Covenant of Good Faith and Fair Dealing

REDACTED

This policy "switch" is especially apropos for class treatment because the Hartford and Liberty Mutual policies were group policies which named T-Mobile as the insured and T-Mobile's subscribers as "additional insureds." Therefore, on July 1, 2005, each and every T-Mobile customer enrolled in the Hartford program was automatically enrolled in the Liberty Mutual program. Asurion Dep. (Schneider), p. 386:6-15. Because all of T-Mobile's customers were switched *en masse*, on July 1, 2005, claims arising from these facts are likewise ideally suited for class treatment.

III. LEGAL STANDARD

A. General Rule

Class actions are governed by Federal Rule of Civil Procedure 23. A party seeking class certification must satisfy the four element test set forth in Rule 23(a), and then show that the case fits into any one of the three categories of class action recognized by Rule 23(b). Zinser v. Accufix Research Institute, 253 F.3d 1180, 1186

(9th Cir. 2001), *as amended*, 273 F.3d 1266 (9th Cir. 2001).

1. Rule 23(a)

Rule 23(a) provides that a class will be certified if a plaintiff can establish that: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. In this case, all four requirements are easily satisfied.

2. Rule 23(b)

After a plaintiff has established that a matter is suitable for class treatment under Rule 23(a), the plaintiff must then show that the class falls within one of the three categories of class action recognized by Rule 23(b). Zinser, 253 F.3d at 1186.

Here, Plaintiff is moving for certification pursuant to Rule 23(b)(3), which states that "a class action may be maintained if Rule 23(a) is satisfied and if . . .[t]he court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Id.

As will be shown below, the proposed class in this case falls squarely within Rule 23(b)(3), because common questions of law and fact clearly predominate, and a class action is inarguably superior to other available methods for fairly and efficiently adjudicating the controversy.

B. The District Court's Analysis

In deciding a motion for class certification, the Court must assume the truth of the substantive allegations of plaintiff's complaint. *See* Eisen & Carlisle v. Jacqueline, 417 U.S. 156, 177-78 (1974); In re Unioil Securities Litigation, 107 F.R.D. 615, 618. (C.D. Cal. 1985). "[T]he court is bound to take the substantive allegations of the complaint as true, thus necessarily making the class order speculative . . ." Blackie v.

Barrack, 524 F.2d 891, 901 n. 17 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976).

The Court's decision to grant class certification lies within its sound discretion. *See* Gulf Oil Co. v. Bernard, 452 U.S. 89, 100 (1981). However, "[i]f there is to be an error made, let it be in favor and not against the maintenance of the class action. . . ." In re Memorex Securities Cases, 61 F.R.D. 88, 94 (N. D. Cal. 1973) (citing Esplin v. Hirschi, 402 F.2d 94, 97 (10th Cir. 1968)).

IV. ARGUMENT

It is respectfully submitted that this case should be certified as a class action for each of the following reasons:

A. The Requirements of Rule 23(a) Are Satisfied

Plaintiff's proposed classes satisfy all four threshold requirements of Rule 23(a): "numerosity," "commonality," "typicality," and "adequacy."

1. Numerosity

The first requirement for class certification under Rule 23(a) is that is that the class be "so numerous that joinder of all members is impracticable." Fed.R.Civ.Proc. 23(a)(1). The Ninth Circuit has consistently held that the "numerosity" requirement is easily satisfied and has certified classes with as few as forty members. Immigrant Assistance Project of Los Angeles County Federation of Labor v. I.N.S., 306 F.3d 842, 869 (9th Cir. 2002). *See also* Jordan v. County of Los Angeles, 669 F.2d 1311, 1319 n.10 (9th Cir. 1982) (discussing thirteen reported cases in which courts have certified plaintiff classes containing as few as seven and as many as 78 members.)

On December 2, 2009, Defendants produced a list containing the name, address, and telephone number of every T-Mobile customer in the United States who was allegedly sent a letter by Asurion notifying them of the switch in underwriters from Hartford to Liberty Mutual. The list spans 47,625 Bates-numbered pages. The names on this list with California addresses are class members. After examining a sample of just 1,869 Bates-numbered pages, Plaintiff determined that at least 30,750 California residents were allegedly sent the policy-switching letter. Hess Decl., ¶ 14, Exh. M.

Accordingly, the number of class members more than satisfies the numerosity requirement.

2. Commonality

"Rule 23(a)(2) has been construed permissively. All questions of fact and law need not be common to satisfy the rule. The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998).

Nor does "common," as used in Rule 23(a)(2), mean "complete congruence." In re First Alliance Mortgage Co., 471 F.3d 977, 990 (9th Cir. 2006). It is enough to satisfy commonality that plaintiffs share one common issue of law or fact and their "'situations are sufficiently parallel to insure a vigorous and full presentation of all claims for relief.'" California Rural Legal Assistance, Inc. v. Legal Services Corp., 917 F.2d 1171, 1175 (9th Cir. 1990). *See also* 1 Herbert B. Newberg & Alba Conte, Newberg on Class Actions, §3.10 at 274-278 (4th Ed. 2002) ("Rule 23(a)(2) is easily met in most cases. When the party opposing the class has engaged in some conduct that affects a group of persons and gives rise to a cause of action, one or more elements of that cause of action will be common to all of the persons affected.")

Here, there are common questions of law and fact regarding all of the causes of action for which Plaintiff is requesting certification, including but not limited to whether the manner of selling Defendants' insurance had the capacity to deceive, and whether it was lawful for Defendants to sell insurance underwritten by Liberty Mutual when not licensed to do so. Damages, too, may be calculated using Defendants' own records. T-Mobile Dep. (Katz), pp. 129:1-130:4.

a. Misrepresentation-Based Claims – Counts 1, 2, 4, 5, and 6

Plaintiff's UCL and common-law misrepresentation claims are based on a common course of conduct and therefore present common questions of law and fact suitable for adjudication on a classwide basis.

i. Proposed Misrepresentation Class

Plaintiff respectfully requests that the Court certify the following class with respect to Counts 1, 2, 4, 5, and 6:

> "All persons who while residing in the State of California purchased cellular telephone insurance from Asurion through T-Mobile USA from August 1, 2003 to April 2, 2008."

The start date of this class is August 1, 2003, because this is when T-Mobile started selling the Asurion insurance. The end date is April 2, 2008, because this is when Asurion entered into a settlement agreement with the Attorney General of Maryland which required Asurion to make significant disclosure improvements to its brochure, including making the disclosure that consumers may receive refurbished telephones noticeable. Hess., ¶¶ 7-8, Exhs. F-G. Therefore, Plaintiff is limiting the scope of her proposed misrepresentation class to California consumers who purchased Asurion's insurance prior to April 2, 2008, when the improved disclosures required by the Attorney General's office started. In other words, this class consists of those who, like Plaintiff, received the old, inadequate disclosures.

ii. UCL Claims - Counts 1 and 2

Counts 1 and 2 of Plaintiff's TAC are for violations of the fraudulent prong of California's Unfair Competition Law (UCL), Cal. Bus. & Prof. C. § 17200

(a.) Elements of the Cause of Action

California's UCL prohibits "any unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof. C. § 17200.

(i.) Fraudulent

The "fraud" prong of the UCL only requires proof that the defendant's conduct "has a capacity, likelihood or tendency to deceive or confuse the public." Kasky v. Nike Inc., 27 Cal.4th 939, 951 (2002). As recently explained by the California Supreme Court, even post-Proposition 64, the UCL does not require reliance by absent class members or proof that any individual consumer was actually deceived:

> "[R]elief under the UCL is available without individualized proof of deception, reliance and injury. (E.g., Bank of the West v. Superior Court, 2 Cal.4th 1254, 1267 (1992); Committee on Children's Television, Inc. v. General Foods Corp., 35 Cal.3d 197, 211; Fletcher v. Security Pacific National Bank 23 Cal.3d 442, 453 (1979).

Tobacco II, 46 Cal.4th at 320.

Once the broad dissemination of common misrepresentations to the class has been established, "the ultimate question of whether the undisclosed [or affirmatively misrepresented] information was material [is] a common question of fact suitable for treatment in a class action." Massachusetts Mutual Life Insurance Co. v. Superior Court, 97 Cal.App.4th 1282, 1294 (2002). *See also* Blakemore v. Superior Court, 129 Cal.App.4th 36, 56 (2005) (rejecting argument that the varied subjective reasons for each member's conduct was relevant to liability or class certification under the UCL).

In its landmark Tobacco II decision, the Supreme Court reiterated the appropriateness of UCL fraud claims for class treatment, explaining all that needs to be shown is a capacity or tendency to deceive the public as opposed to any actual deception of absent class members:

> "[T]o state a claim under either the UCL or the false advertising law, based on false advertising or promotional practices, 'it is necessary only to show that "members of the public are likely to be deceived.'"

Tobacco II, 46 Cal.4th at 311. Individualized reliance on the part of class members need not be shown. Id.

(ii.) Unlawful

"Unlawful" business acts or practices within the meaning of the UCL "include anything that can properly be called a business practice and that at the same time is forbidden by law." McKell v. Washington Mutual, Inc., 142 Cal.App.4th 1457, 1475 (2006). A violation of the law is a *per se* violation of the UCL. Saunders v. Superior Court, 27 Cal.App.4th 832 (1994).

(iii.) Unfair

The unfair prong of the UCL may be established by weighing "the utility of the defendant's conduct against the gravity of the harm to the alleged victim." State Farm Fire & Cas. Co. v. Superior Court, 45 Cal.App.4th 103, 1104.

iii. Common-Law Fraud

Counts 4 and 5 of Plaintiff's TAC are for common-law intentional and negligent misrepresentation. The elements of Plaintiff's fraudulent nondisclosure claim are: (1) an omission of material fact; (2) knowledge of falsity; (3) intent to defraud; (4) justifiable reliance; and (5) damages. Lazar v. Superior Court, 12 Cal.4th 631, 638 (1996); *see* Small v. Fritz Companies. Inc., 30 Cal.4th 167, 173 (2003).[1]

In the leading case of In re First Alliance Mortgage Co., 471 F.3d 977 (9th Cir. 2006), the Ninth Circuit explained that it favors class treatment in cases involving common misrepresentations:

> "[A] fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action . . . . **[T]his court has followed an approach that favors class treatment of fraud claims stemming from a 'common course of conduct'**. . ."

Id. at 989. (Emphasis added.)[2] *See also* Blackie v. Barrack, 524 F.2d 891, 902 (9th Cir.

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[1] Plaintiff bears an even lighter burden on Count 5 – negligent misrepresentation – because that cause of action does not require a showing of intent to defraud. Conroy v. University of California, 45 Cal.4th 1244 (2009).

[2] In re First Alliance Mortgage is one of a long line of cases from across the country which hold that misrepresentation claims based on a common course of conduct are especially suitable for adjudication on a classwide basis. for class treatment. *See. e.g.* In re Prudential Insurance Co. Of America, 148 F.3d 283, 314 (3d Cir. 1998); Kennedy v. Tallant, 710 F.2d 711, 717 (11th Cir. 1983); Davis v. Southern Bell Telephone & Telegraph Co., 158 F.R.D. 173, 176 (S.D. Fla. 1994); Negrete v. Allianz Life Insurance Co. of North America, 238 F.R.D. 482 (C.D. Cal. 2006); Heastie v. Community Bank of Greater Peoria, 125 F.R.D. 669 (N.D. Ill. 1989); Schaefer v. Overland Express Family of Funds, 169 F.R.D. 124, 130 (S.D. Cal. 1996); Stanich v. Travelers Indemnity Co., 249 F.R.D. 506 (N.D. Ohio

1975) ("Confronted with a class of purchasers allegedly defrauded over a period of time by similar misrepresentations, courts have taken the common sense approach that the class is united by a common interest in determining whether a defendant's course of conduct is in its broad outlines actionable, which is not defeated by slight differences in class members' positions"); Harris v. Palm Springs Alpine Estates, Inc., 329 F.2d 909, 914 (9th Cir. 1964).

Although as demonstrated below the fraud in this case followed a uniform sales script, the Ninth Circuit has even rejected the notion that individualized oral presentations to class members could somehow preclude class certification. Noting that the proper focus is on the underlying scheme itself, the Court explained that:

> In In re American Continental Corp./Lincoln Savings & Loan Securities Litigation, 140 F.R.D. 425 (D. Ariz. 1992), the court correctly rejected a 'talismanic rule that a class action may not be maintained where a fraud is consummated principally through oral misrepresentations, unless those representations are all but identical,' observing that such a strict standard overlooks the design and intent of Rule 23. . . .**The exact wording of the oral misrepresentations, therefore, is not the predominant issue. It is the underlying scheme which demands attention.**"

First Alliance, 471 F.3d at 991 (Emphasis added and internal citations omitted.) The court observed that the "scheme was built on inducing borrowers to sign documents without really understanding the terms" and that the forms were used "with the fraudulent intent of inducing reliance." Id. at 992. *See also* Vasquez v. Superior Court, 4 Cal.3d 800, 814 (1971): "The rule in this state ... is that it is not necessary to show reliance upon a false representation by direct evidence. The fact of reliance upon alleged false representations may be inferred from the circumstances attending the

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2008); In re American Continental Corp./Lincoln Savings & Loan Securities Litigation, 140 F.R.D. 425, 430 (D. Ariz. 1992); and Peterson v. H & R Block Tax Services, 174 F.R.D. 78 (N.D. Ill. 1997).

transaction which oftentimes afford much stronger and more satisfactory evidence of the inducement which prompted the party."

Here, Plaintiff's common-law misrepresentation claims are based on a common course of conduct and therefore present common questions of fact and law.

iv. Plaintiff's Misrepresentation Claims Are Based on a Common Course of Conduct

Here, the evidence establishes that the Ms. Cole's misrepresentation claims are based on a common course of conduct and are therefore suitable for adjudication on a classwide basis pursuant to Tobacco II and First Alliance.

(a.) Ms. Cole Purchases Asurion's Insurance

As stated above, on April 19, 2004, Plaintiff Wineesa Cole purchased her a cellular phone and Asurion's cellular telephone insurance. At the retailer, Ms. Cole dealt with a sales representative named "Ricky." Ricky suggested that Ms. Cole purchase Asurion's Equipment Protection Program. ("EPP"). Cole Dep, p. 79:22-25. Ms. Cole testified that Ricky made the following statements regarding the EPP:

"Q. What did he tell you about the Equipment Protection Program?

A. **That it was $3.99 a month, $35 deductible. It covered my phone if it was lost, stolen or damaged.**

Q. **Did he say anything else?**

A. **Huh-uh.**"

Cole Dep., p. 82:6-13. (Emphasis added.)

Ricky then pulled out a folding brochure and showed a portion of it to Ms. Cole; he pointed to bullet points in the brochure which were consistent with his oral representations regarding the nature of the EPP's coverage (lost, stolen, or damaged equipment), premium ($3.99 per month) and deductible ($35.00). Cole Dep., pp. 83:5-85:8, 89:21-24; Hess Dec., ¶ 2, Exh. A.

Ms. Cole testified that during the sales pitch, Ricky did **not** inform her that the EPP permitted Asurion to fill claims with refurbished equipment, and he did not point

to any language in the brochure which explained that fact. Cole Dep., pp. 88:8-25. Ms. Cole further testified that if Ricky had provided her with that information, she never would have signed up for the EPP. Cole Dep., p. 89:2-18.

REDACTED

(b.) The Preprinted Brochure

REDACTED

(c.) Material Omissions from The Brochure

As the Court pointed out in its December 1 Order, the brochure's disclosure that a consumer may receive a refurbished phone "is made in fine print, in the last column of five columns of text . . ." Hess Decl., ¶ 9, Exh. H. The Court also noted that the brochure does **not** disclose that a class member may receive a replacement telephone that is worth less than the cost of the deductible. Id.

REDACTED

In its December 1, 2009 Order, the Court noted that "according to Plaintiff's deposition testimony, the sales representative who showed her the brochure did not call her attention to the language regarding use of refurbished replacement phones or otherwise discuss with her that subscribers to the program could have their phones replaced with refurbished ones." Hess Decl., ¶ 9, Exh. H.

REDACTED

While case law requires that there only be one issue of fact or law common to the class to certify, in this case all of these issues of law and fact are common to Ms. Cole and the plaintiff class.

b. Policy-Switching Class - Counts 2, 3, 5, 6 and 9

Defendants' policy-switching also presents common questions of material fact.

i. Proposed Policy-Switching Class

Plaintiff respectfully requests that the Court certify the following class:

"All persons who while residing in the State of California were switched on July 1, 2005 from a T-Mobile cell phone insurance policy underwritten

by The Hartford to a T-Mobile cell phone insurance policy underwritten by Liberty Mutual with a monthly premium of $5.99, and a deductible of $110, and paid a premium at any time between July 1, 2005 and August 2, 2006."

ii. Unlicensed Sale of Insurance - Count 3

Again, a violation of any other law is a *per se* violation of the UCL. Saunders v. Superior Court, 27 Cal.App.4th 832 (1994). *See also* Stop Youth Addiction, Inc. v. Lucky Stores, Inc., 17 Cal.4th 553, 565 (1998). Count 3 alleges that Defendants violated the "unlawful" prong of the UCL by engaging in the unlicensed sale of insurance. Cal. Insurance Code § 1758.6 requires wireless carriers who sell cellular telephone insurance to obtain a license. Cal. Insurance Code § 1758.62(a) requires a notice of appointment to be filed with the California Department of Insurance before an agent may transact business on behalf of a particular insurer.

On July 1, 2005, Asurion and T-Mobile switched all of their existing customers from a policy underwritten by The Hartford to a new policy underwritten by Liberty Mutual. The policy switch was automatic; customers did not have to take any affirmative action to be switched from the Hartford policy to the Liberty Mutual policy. Asurion Dep. (Schneider), pp. 385:8-386:16.

At the time of the switch, neither Asurion nor T-Mobile had been appointed as Liberty Mutual's agent, as required by Cal. Insurance Code § 1758.62(a). In other words, neither defendant was licensed to transact business on behalf of Liberty Mutual. Hess Decl., ¶ 10, Exh. I. Asurion was not appointed as Liberty Mutual's agent until November 22, 2005, and T-Mobile was not appointed as Liberty Mutual's agent for more than thirteen months – not until August 2, 2006. Hess Decl., ¶ 11, Exh. J.

Accordingly, Defendants engaged in a common course of conduct – the unlicensed sale of insurance – from July 1, 2005 to August 2, 2006. Every existing T-Mobile customer who was "switched" from Hartford to Liberty Mutual on July 1, 2005, and paid premiums between July 1, 2005 and August 2, 2006, was sold insurance

from an unlicensed agent. Therefore, Count 3 presents common issues of law and fact that are perfectly suited for class treatment

iii. Misuse of Discretionary Power - Counts 2, 5, 6,and 9

Count 9 of the TAC is for breach of contract. A covenant of good faith and fair dealing is implied, by operation of law, in every contract. *See* Foley v. Interactive Data Corp., 47 Cal.3d 654 (1988) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.") In particular, the implied covenant requires a party with discretionary power under a contract to exercise that power reasonably and in good faith. Badie v. Bank of America, 67 Cal.App.4th 779, 796 (1998) ("Abuse of the power to specify terms is one of the judicially recognized types of bad faith"); Acree v. GMAC, 92 Cal.App.4th 835, 108-109 (2001) ("Although GMAC can unilaterally determine the premium refund method, that decision, pursuant to the implied covenant, must be a reasonable one; legitimate expectations naturally flow from this recognition.")

REDACTED

Again, all of T-Mobile's customers were switched *en masse* to the newly proposed Asurion program; this claim – like the others – is amenable to class treatment.

3. Typicality

The next Rule 23(a) requirement is typicality. Like the commonality requirement, the typicality requirement is "**permissive**" and requires only that the representative's claims be "reasonably co-extensive with those of absent class members; they need not be substantially identical." Hanlon, 150 F.3d at 1020. The typicality requirement looks to whether "the claims of the class representatives [are] typical of those of the class, and [is] 'satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." Armstrong v. Davis, 275 F.3d 849, 868 (9th Cir. 2001), quoting Marisol A. v. Giuliani, 126 F.3d 372, 376 (2d Cir. 1997). Commonality

and typicality "tend to merge," such that factors that support a finding of commonality also support a finding of typicality. *See* General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 157 (1982); In re United Energy Corp. Solar Power Modules Tax Shelter Investments Sec. Litig., 122 F.R.D. 251, 256 (C.D. Cal. 1988).

Here, Ms. Cole's claims are plainly typical of those of the plaintiff class since the claims of both Ms. Cole and the class arise from the same standardized sales pitch and course of events and, as stated above, can be proven on a classwide basis. Accordingly, Ms. Cole's claims satisfy the typicality requirement.

4. Adequacy

The Ninth Circuit uses a two-factor test to determine whether a plaintiff and his counsel will adequately represent the interests of the class: "(1) do the representative plaintiffs and their counsel have any conflicts of interest with other class members, and (2) will the representative plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" Staton v. Boeing Co., 327 F.3d 938, 957 (9th Cir. 2003); Crawford v. Honig, 37 F.3d 485, 487 (9th Cir. 1995).

a. There Are No Conflicts of Interest

It is obvious that there are no conflicts of interest between Ms. Cole and the other members of the putative classes. She is a typical consumer, and the transaction she entered into with Defendants was likewise typical. There is absolutely nothing that makes her interests adverse to those of the class. Likewise, Ms. Cole's counsel, the Kick Law Firm, APC, has no conflicts of interest in this matter as they have never represented any of the defendants. (Hess Decl., ¶ 31.)

b. Ms. Cole and Counsel Will Vigorously Litigate the Case

It is also clear that Ms. Cole will vigorously prosecute this action. Ms. Cole's strength of character was dramatically tested - and proven – when Defendants made an improper individual settlement offer to her in an attempt to "buy off" Ms. Cole and prevent this motion for certification from being brought. On July 10, 2008, Defendants made an attempt to buy Ms. Cole off as a lead plaintiff in this case by offering her

$10,000 personally. Hess Decl., ¶ 15, Exh. N. Then, when she would not be bought off, shortly after her deposition Defendants doubled their unlawful offer to her, trying to tempt her to abandon the putative class members with a settlement offer in the amount of $20,000 – an amount obviously far in excess of the value of her individual claim. Hess Decl., ¶ 16, Exh. O. Ms. Cole rejected this offer to be bought off even though it would have been of personal benefit to her, and instead remained resolute to represent the best interests of the class members rather than putting her own interest ahead of theirs. Ms. Cole has also vigorously prosecuted this action for more than two years, and has produced documents and sat for a deposition. Accordingly, there is no question that she is an ideal class representative.

Ms. Cole's attorneys, The Kick Law Firm, APC, are likewise plainly qualified to serve as class counsel. They are experienced class action attorneys who have been appointed as class counsel in consumer class actions, and have vigorously prosecuted this action for over two years and will continue to do so. (Hess Decl., ¶¶ 28 - 30.)

B. The Requirements of Rule 23(b)(3) Are Satisfied

Finally, Fed.R.Civ.Proc. 23(b) requires that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Here, Ms. Cole's claims easily satisfy both requirements of Rule 23(b)(3).

1. Common Questions Predominate Over Individual Questions

The predominance test focuses on "the relationship between the common and individual issues." Hanlon, 150 F.3d at 1022. Rule 23(b)(3) was intended to "cover cases 'in which a class action would achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.'" Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 615 (1997), quoting Fed. R. Civ. P. 23(b)(3) Adv. Comm. Notes to 1966 Amendment). *See* Hubler Chevrolet v. General Motors

Corp., 193 F.R.D. 574, 580 (S.D.Ind. 2000) (satisfying Rule 23(b)(3) "merely requires that the class claims have a dominant, central focus. Satisfaction of this criterion normally turns on the answer to one basic question: is there an essential common factual link between all class members and the defendant?")

Here, the common and individual issues are not just closely related – they are identical, because all members of the misrepresentation class received the same standardized sales pitch, and all members of the unlicenced sale and policy-switching subclasses were sold insurance from an unlicensed agent and were switched to a new policy *en masse*. So common questions predominate. For these reasons, class treatment will clearly achieve judicial economy by avoiding a multiplicity of actions. There is absolutely no reason to try Ms. Cole's claims separately from those of the class; separate trials would be a pointless waste.

2. A Class Action Is Superior to Other Forms of Litigation

Superiority is demonstrated where "classwide litigation of common issues will reduce litigation costs and promote greater efficiency." Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996). Rule 23(b)(3) sets forth factors for determining whether "a class action [is] superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. 23(b)(3)s explained by the Ninth Circuit in Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180 (9th Cir. 2001), "consideration of these factors requires the court to focus on the efficiency and economy elements of the class action so that cases allowed under subdivision (b)(3) are those that can be adjudicated most profitably on a representative basis."' Id. at 1190 (citation omitted). The Supreme Court has explained that the main purpose of the Rule 23(b)(3) class action is to vindicate "the rights of groups of people who individually would be without effective strength to bring their opponents into court at all,"such as those whose individual recoveries would be too small to warrant an individual suit. Amchem Prods., Inc., 521 U.S. at 617. *See* Hanlon, 150 F.3d at 1023.

Here, Asurion's cellular phone insurance is sold to consumers for a few dollars

per month. Accordingly, the consumers will not have a meaningful incentive to prosecute individual claims, because "even if efficacious, these claims would not only unnecessarily burden the judiciary, but would prove uneconomic for potential plaintiffs. In most cases, litigation cost would dwarf potential recovery. In this sense, the proposed class action is paradigmatic." Hanlon, 150 F.3d at 1019-1023.

V. IF THE COURT GRANTS CERTIFICATION IT SHOULD CONTINUE THE TRIAL TO ALLOW TIME FOR NOTICE TO BE SENT OUT, OR SEND NOTICE POST-TRIAL.

Plaintiff anticipates that Defendants may try to argue that this motion is untimely. Any such argument would be misplaced. As the Court will recall, as of August 18, 2009, almost three years after this lawsuit was filed, Defendants had only produced 131 pages of documents, severely impairing Plaintiff's ability to prosecute the case. Much of the discovery necessary to this class certification motion was not produced until very recently. The Court will also recall that Defendants insisted that Plaintiff submit her individual claim to non-binding arbitration before the class claims could proceed (and even tried to convince this Court that each individual putative class member must submit to the non-binding arbitration individually before being allowed to be a member of this class action.). That process took almost a year.

Delay alone is not a sufficient reason to deny an otherwise meritorious motion for class certification. *See, eg.* Stolz v. United Brotherhood of Carpenters, 620 F.Supp. 396, 402 (D. Nev. 1985): "A delay in filing the motion alone will not be cause for denial of certification."

If there is not enough time to give notice prior to the trial, the Court has the authority to continue the trial date. In Snaur v. Snappy Apple Farms, 203 F.R.D. 281, 284 (W.D. Mich. 2001), the trial court continued the trial date after granting class certification, even though the motion was not filed until two months after the discovery cut off. Id. In this case the motion is being filed less than three weeks after the discovery cut-off, and less than one week after this Court ruled it would not extend the

cut-off. The defendant in Snaur argued that the motion was untimely as it was brought after the discovery cut-off. Id. at 289. The district court disagreed:

> "This case will need to be rescheduled in light of the certification . . . the certification of a Rule 23(b)(3) class . . . necessarily requires delay for notification." (Id.)

The district court further noted that discovery had been "contentious" and that "the completion of the discovery done to date was necessary and pertinent to the class certification motion." Id. As this Court itself observed on December 3, 2009, not only has discovery in this case also been "contentious," but the Court had very strong feelings that it expressed at the hearing about which party was to blame for this. Regardless, as in Snaur, Plaintiff here did not get discovery "necessary and pertinent" to the class certification motion until late in the litigation, and here filed a class certification motion far sooner after the discovery cut-off than the Plaintiffs in Snaur.

If the Court is not inclined to continue the trial date, the Court should order that notice be sent out post-trial. Because Defendants have twice moved for summary judgment, they have waived the right to insist that notice be sent prior to trial. *See* Postow v. OBA Federal Savings & Loan Assocation, 627 F.2d 1370 (D.C. Cir. 1980).

VI. CONCLUSION

For each of the foregoing reasons, it is respectfully submitted that this motion should be granted.

Respectfully submitted,

Dated: December 20, 2009

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